

REMARKS/ARGUMENTS

By this paper, Applicant replies to the Office Action of June 17, 2009 and respectfully requests reconsideration of the application.

Claims 1-7, 8-21, 25-35, 37-44, 47, 49-55, 57-71, 73-83, 85-92, 95, 97-101, 105, 106, 108, 109, 112, 113, and 118-127 are now pending. Claims 1, 20, 25, 32, 49, 68, 73, 80, 92, 97, 126 and 127 are independent. The claims have been amended to simplify the case for restriction and examination purposes. For example, many of the claims that were alleged to be “independent and distinct” were related as broader-and-narrower genus-and-species claims; narrower species or subgenus claims have now been amended to be dependent from the broader genus claims in order to simplify examination, and to make clear that restriction is not appropriate. These amendments are not narrowing, and are not made for a reason of statutory patentability.

As Applicant noted in his paper of March 2009, the Restriction Requirement of October 2008 is flawed in so many respects that

- (a) it is too procedurally flawed to raise any requirement,
- (b) Applicant is unable to make an informed or binding election based on the incomplete statement of basis for the requirement; and
- (c) the PTO failed to follow the procedures required by the Administrative Procedure Act, the Paperwork Reduction Act, and various orders to agencies from the Executive Office of the President. Several of these statutes and Presidential directives specifically deny the PTO any authority to do what was done here, and negate 37 C.F.R. § 1.142. *E.g.*, 44 U.S.C. § 3512 (“Notwithstanding any other provision of law...”). Statutes and Presidential directives trump CFR rules, and the PTO may not rely on § 1.142 to maintain a restriction that violated other laws.

Because the Examiner’s paper violates a number of MPEP provisions and the PTO violated several laws, Applicant is under no obligation to elect.

Applicant incorporates by reference the Remarks from the Reply of March 2, 2009, and reiterates those remarks.

Nonetheless, and only to prevent abandonment, Applicant provisionally elects claim 97 as a linking claim. Claim 97 is generic to all claims pending as of October 2008, and therefore applicant elects all claims.

In the alternative, and only in the event that the Examiner answers each and every one of the following matters traversed:

- The Office Action of October 2008 violated instructions repeated throughout Chapter 800 of the MPEP, that every restriction requirement must include one of Form Paragraphs 8.21.01 through 8.21.03 (that is, answer all material traversed in § I(A) of Applicant's paper of March 2, 2009);
- The Office Action of October 2008 violated MPEP § 808.02 and the Administrative Procedure Act in the respects discussed at § I(B) of Applicant's paper of March 2, 2009;
- The Office Action of October 2008 violated MPEP § 803(I)(B), § 803(II) ¶ 4, and § 806.01 and the Administrative Procedure Act in the respects discussed at § I(C) of Applicant's paper of March 2, 2009;
- The Office Action of October 2008 violates the Paperwork Reduction Act; to restrict in this manner, the PTO must answer all four questions posed at § II(A), page 8, of Applicant's paper of March 2, 2009 (Applicant has investigated, and the questions cannot be answered in a way that supports this restriction);
- The Office Action of October 2008 violated instructions to the PTO from the President of the United States, the Final Bulletin on Agency Good Guidance Practices;¹
- An election of claim 97 is an election of a generic linking claim that requires examination of all claims;

then ***and only if the Examiner sets forth specific answers to all six of the above matters traversed***, Applicant elects a group including claims 1-19, 25-67, 73-95, 118-120, 122, and 124-125 (less the claims that are cancelled).

Applicant hereby authorizes the USPTO to communicate with any authorized representative concerning this application by electronic mail.

Applicant requests that the application be passed to issue in due course. The Examiner is urged to telephone Applicant's undersigned counsel at the number noted below if it will advance the prosecution of this application, or with any suggestion to resolve any condition that would impede allowance. In the event that further extension of time is required, Applicant petitions for

¹ Executive Office of the President, *Final Bulletin for Agency Good Guidance Practices*, OMB Memorandum M-07-07, <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf> (Jan. 18, 2007), 72 Fed. Reg. 3432 (Jan. 25, 2007), § II(1)(b) ("Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence.") and § IV (PTO must run any amendments to the MPEP through notice and comment after a notice in the Federal Register).

that extension of time required to make this reply timely. For the entire pendency of this application, the Commissioner is authorized to charge any additional required fees (including all extension of time fees), or credit any overpayment, to Deposit Account No. 50-3938, Order No. 03-6171.

Respectfully submitted,
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Dated: October 19, 2009

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